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In the

Supreme Court of the United States

October Term, 1994

HOWARD W. GEORGE, BARRY SKOKOWSKI, SR. and MELVIN R. PRIMAS, individually, and in their official capacities,

Petitioners,

v.

JOSEPH CASALE and WILLIAM EDMUNDS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF ON BEHALF OF PETITIONERS

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PRELIMINARY STATEMENT

Petitioners Harold W. George, Barry Skokowski, Sr., and Melvin R. Primas, Jr. submit this brief in reply to the brief filed by the respondents Joseph Casale and William Edmunds in this matter. In filing this reply brief, the petitioners will rely on the Statements of Questions Presented, Opinions Below and Jurisdiction, and the Statement of the Case set forth in their Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The First Amendment, and this Court's holdings in Elrod v. Burns, 427 U.S. 347 (1976), Branti v. Finkel, 445 U.S. 347 (1980) and Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990), protect public employees from discharge because of their affiliations with, or their activities on behalf of, political candidates and political parties. The record in this matter does not disclose any facts regarding the political affiliations and activities of either the respondents or the individuals hired by the petitioners to work in the Office of the Ombudsman for the Institutionalized Elderly. Moreover, the record does indicate that none of the petitioners were aware of what, if any, political affiliations or beliefs these individuals may have had. In light of these circumstances, it is clear that the principles enunciated by this Court in Elrod v. Burns, Branti v. Finkel and Rutan v. Republican Party of Illinois have no application to the facts presented in this matter, that the decisions rendered by the Circuit Court of Appeals and the District Court consequently constitute an unwarranted and unprecedented misapplication of such holdings, and that the petition for writ of certiorari which has been filed in this matter should accordingly be granted for the purpose of reviewing and reversing these decisions.

ARGUMENT

IN THE ABSENCE OF ANY INDICATION WHATSOEVER IN THE RECORD THAT THE EMPLOYMENT DECISIONS MADE BY THE PETITIONERS WERE IN ANY WAY PREMISED UPON THE POLITICAL AFFILIATIONS AND ACTIVITIES OF EITHER THE RESPONDENTS OR THOSE INDIVIDUALS HIRED BY THE PETITIONERS TO WORK IN THE OMBUDSMAN'S OFFICE, IT IS CLEAR THAT THE PRINCIPLES SET FORTH IN ELROD V. BURNS, BRANTI V. FINKEL, AND RUTAN V. REPUBLICAN PARTY OF ILLINOIS HAVE NO APPLICATION TO THE CIRCUMSTANCES PRESENTED IN THIS MATTER.

In their brief in opposition to the Petition for Writ of Certiorari in this matter, the respondents argue that the decisions rendered by the Court of Appeals and the district court below raise no novel, unique or unusual interpretations of law. However, as has been amply demonstrated in the Petition for Writ of Certiorari filed by the petitioners, the decisions of these lower courts would extend the protections afforded by the First Amendment, and the principles enunciated in this Court's opinions in Elrod, Branti and Rutan in this regard, far beyond their intended scope and accordingly demand review and reversal by this Court.

In seeking to avoid review of this case by this Court, respondents essentially argue that the record in this matter contains facts which would support a finding that the respondent's exercise of their First Amendment rights to affiliate or not affiliate with, or to engage or not engage in political activities on behalf of, a political candidate or political party was the basis for the termination of their employment with the Office of the Ombudsman of the Institutionalized Elderly. However, in making this assertion, respondents fail to note a single fact in their brief regarding either their political affiliations or activities or the political affiliations or activities of those individuals who were hired to work in the Ombudsman's Office during the time period in question.

Certain basic, salient facts are clear regarding the termination of the plaintiffs' employment with the State of New Jersey. Respondents were employed in the Office of the Ombudsman for the Institutionalized Elderly as "at will" employees and accordingly were subject to termination without cause. Prior to their termination, their supervisor was an individual named Rick Abrams. Abrams was asked by two of the defendants, Skokowski and Primas, to terminate the respondents' employment. Abrams indicated he would not do so. As consequence of this and other circumstances, it was determined that Abrams would be removed from his position as Ombudsman. However, it was also determined that he would continue to serve as Ombudsman, in a holdover capacity, until his replacement was appointed.

During the interim time period that Abrams was serving in a holdover capacity, Primas and Skokowski were responsible for ensuring the proper operation of the New Jersey Department of Community Affairs and its constituent agencies and divisions. In carrying out these responsibilities, they hired certain individuals to work in the Ombudsman's Office. Two of these individuals, Macchi

and Mahoney, had previously been employed in other governmental positions in the State of New Jersey. Macchi had served as executive director of a county office in aging and, in that position, was responsible for administering a variety of programs for the elderly. Mahoney had been employed previously in the New Jersey Governor's office in Washington, D.C. as well as with a private association that dealt with governmental issues. A third individual, Brown, had previously been employed in certain public and private institutions in the State of Maryland which dealt with the problems of the elderly and had also known the defendant Primas for a substantial period of time. While Abrams was not consulted with regard to the appointment of these individuals, it was clear that he was serving in a holdover capacity and would only continue to serve in that capacity for a short period of time.

Following his appointment to replace Abrams as Ombudsman, the defendant George reviewed the operations of the Office of the Ombudsman. He decided to retain the individuals previously hired by Primas and Skokowski, to also hire a legal counsel, and to terminate the employment of the respondents. He advised the respondents of this determination in writing. Subsequently, he met with them and advised them that they had been terminated for budgetary reasons.

In evaluating the contents of the record, it is essential to note not only what is contained, but also what is not contained, in the record. There is nothing in the record to indicate whether either of the respondents had ever been affiliated with, or had ever engaged in any political activity on behalf of, any political candidate or any political party. What the record does make clear is that none of the petitioners were aware of what, if any, political affiliations or beliefs the respondents may have had. The record also fails to indicate whether either Macchi, Mahoney or Brown had ever been affiliated with, or engaged in any political

activity on behalf of, any political candidate or political party. Moreover, the record contains no indication that any of the defendants were aware of or considered what, if any, the political affiliations or activities of these individuals may have been.

Consideration of what facts are and are not contained in the record clearly demonstrates that this case has absolutely nothing to do with the exercise of rights of political affiliation and political activity under the First Amendment. More specifically, there is nothing in the record to indicate that the decisions made by the petitioners to discharge certain individuals and hire others had anything to do with these individuals' support or failure to support any political party or candidate. In turn, in the absence of any indication in the record that any of the defendants considered, or were even aware of, the political affiliations and activities, or lack thereof, of the respondents, it is clear that any such affiliations or activities could not have been a factor in the decision to terminate the respondents' employment.

Similarly, in the absence of any indication in the record that the defendants considered, or were even aware of, the political affiliations and activities, if any, of any of the individuals who were hired to work at the Ombudsman's Office during the time period in question, there is also no basis whatsoever to conclude that such affiliations or activities had anything to do with the decisions to hire those individuals. Rather, this case simply involves the discharge of two "at will" public employees who were subject to discharge for any or no reason at all. It does not involve, and has absolutely nothing to do with, any deprivation or chilling of the respondents' right of political affiliation under the First Amendment.

Respondents attempt to circumvent these basic facts by asserting repeatedly in their brief that the individuals hired to work in the Ombudsman's Office during the time period

in question were involved in "the political process" and were "politically connected". A review of respondents' brief indicates that, in employing the terms "political process" and "political connections", respondents are not referring to activities, such as affiliating with political parties or engaging in partisan political activities, which would fall within the protection of the First Amendment. Rather, the references in their brief to involvement in the "political process" and to "political connections" pertain to the prior public employment of Mahoney and Macchi and the prior personal relationship between Brown and Primas. Of course, hundreds of thousands of other individuals, including the plaintiffs, have been or are now employed in the public sector. Similarly, individuals with prior professional or personal relationships with public officials have been offered and secured public employment. Previous employment by public entities and prior professional or personal relationships with public officials do not implicate the exercise of First Amendment rights. Such activities are clearly distinct from and have nothing to do with the type of affiliations with or activities on behalf of political candidates and organizations which are protected by the First Amendment.

What the respondents are really saying in arguing that they were terminated in order to permit the appointment of other individuals who were "politically connected" is evidenced by the statement made by respondents' counsel during her closing statement in which she stated that this is a case of "it's not what you know, it's who you know" (Pa 424).[1] While, such an assertion was clearly intended to characterize the actions of the petitioners in a negative and pejorative manner, such a characterization has nothing to do with the exercise of the First Amendment rights. Rather, to invoke the protections afforded under the First Amendment,

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[1]The reference "Pa" refers to the Appendix filed by the petitioners with the Third Circuit Court of Appeals below.

some clear demonstration is required that the termination of the respondents' employment was a result of their political affiliations or activities. Respondents have simply failed to make any such demonstration.

Accordingly, there is nothing in the record to indicate that the termination of the respondents' employment with the Office of the Ombudsman had anything to do with any decisions which they have made to either affiliate, or not affiliate, with any political candidate or political party. There is nothing in the record to indicate that the termination of the respondents' employment had anything to do with their decision to engage, or not engage, in political activity protected by the First Amendment. There is nothing in the record to indicate that any of the three individuals who were hired to work in the Office of the Ombudsman during the time period in question had been affiliated with any political candidate or any political party. Nor is there anything in the record to indicate that any of these individuals had ever engaged in any political activity on behalf of any political candidate or political party. In sum, there is nothing in the record to indicate that the decisions to terminate the employment of the plaintiffs and the decisions to hire the other three individuals were, in any way, related to the affiliations, or lack thereof, of such individuals with any political candidate or any political party or with the activities undertaken by such individuals on behalf of such candidates or such political parties.

In sum, it is clear that the decisions rendered by the courts below constitute a totally unwarranted extension of the principles set forth in Elrod, Branti and Rutan and would serve to entitle any public employee who lost his or her job to recover damages against his or her former public employer in any case in which that employee could show that his or her former employer had elected to hire other individuals who had previously held positions of public employment or who had previously had some professional

or personal relationship with a public official. This Court's holdings in Elrod, Branti and Rutan simply do not stand for the propositions which have been asserted by respondents and which are implicit in the decisions of the lower courts in this matter. Accordingly, this court should grant the petition for certiorari.

CONCLUSION

For the foregoing reasons and those set forth in the petition for a writ of certiorari previously filed with this court, it is respectfully submitted that this petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

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